

Date: September 25, 2001

To: Chairman Getman and Commissioners Downey, Knox, Scott, and Swanson

From: Mark Krausse, Executive Director

EXECUTIVE DIRECTOR'S REPORT

This is a summary of administrative activity and other matters since the report sent to you prior to the September commission meeting.

A. PERSONNEL

The Enforcement Division has hired a new attorney, Amanda Stoltmack, who will begin work on October 1, 2002. Ms. Stoltmack comes to the commission from the Legislative Counsel's Office. The division also has filled an investigator position with the hiring of Charles Bilyeu, who will begin work on November 1, 2002. Mr. Bilyeu has extensive experience as a police officer and criminal investigator with the U. S. Navy.

The Enforcement Division has received the resignations of two employees. Accounting Specialist Bob Perna, a 10-year FPPC employee, will leave the commission at the end of September to join the Department of Motor Vehicles. In addition, Senior Investigator Bill Motmans, who has been with the commission for eight years, will leave in October to work for the Sacramento District Attorney's Office. Both Mr. Perna and Mr. Motmans are major contributors to the Enforcement Division's work and will be sorely missed.

The Legal Division is conducting interviews for three positions: legal analyst, commission counsel, and graduate student assistant.

The Technical Assistance Division has received the resignation of Susan Burgess, a staff services analyst in the statement of economic interests (SEI) unit. Ms. Burgess, who is transferring to the Department of Social Services on October 1, joined the commission in May of 2000.

B. STAFF PROJECTS

The commission's Legal Division has increased its efforts to assist state government officials concerning the conflict-of-interest provisions of the Political Reform Act. On September 7, 2001, General Counsel Luisa Menchaca and Ted Prim of the Attorney General's Office led a state ethics

training seminar for members of the newly-created California Consumer Power and Conservation Financing Authority.

In another joint effort, Assistant General Counsel John Wallace and Ted Prim led a training session coordinated by the Governor's Office for state ethics training officers and chief counsels of various agencies. Of over 30 participants, about one third were from agencies that administer laws relating to energy. Those attending received an overview of the Political Reform Act, section 1090, incompatible offices, incompatible activities, and related ethics laws. General Counsel Luisa Menchaca and Carla Wardlow, Chief of the Technical Assistance Division, answered questions.

Other ethics outreach projects are scheduled or in progress. The Legal Division is working with the Attorney General's Office to update the interactive state ethics training course available through the internet. This should be completed by the end of October. Also, FPPC staff will coordinate another program with the Governor's Office to provide training to state departments concerning disqualification and disclosure laws and to provide technical assistance concerning the development and amendment of conflict-of-interest codes.

At the local level, Assistant General Counsel John Wallace assisted Chairman Getman in a presentation to the County Counsels Association in San Diego on September 27, 2001. Legal Division staff will also participate in the League of Cities annual conference December 18-20 in Sacramento. Staff will provide training concerning the Act's conflict-of-interest rules.

The Technical Assistance Division provided training in September to candidates and treasurers in Fresno, and Lynda Cassady spoke on the subject of campaign disclosure at the Green Party's Northern California meeting. Filing officer outreach visits were made to the Contra Costa Superior Court, Sierra County, the Department of Motor Vehicles and the cities of Compton, Tehachapi, Coronado and San Pablo.

The Public Education Unit is completing revision and review of various fact sheet publications, including materials on consultants, conflict-of-interest codes and the financial disclosure obligations of public officials. The unit is completing work on a new booklet, a media guide to the FPPC. The unit continues to review and edit other documents from other divisions, including the draft instructions for the 2001-2002 Form 700 Statement of Economic Interests. This activity is in addition to the unit's ongoing production of the *FPPC Bulletin* and updating, maintenance and improvement of the agency web site.

D. APPROVAL OF CONFLICT OF INTEREST CODES/AMENDMENTS

Since the last commission meeting, the agency has approved the following codes/amendments:

California Department of the Military
Kaweah Delta Water Conservation District
North Bay Schools Insurance Authority
Special District Risk Management Authority

E. ACTION ITEM - REVISED STATEMENT IN INCOMPATIBLE ACTIVITIES

Attached for your discussion and approval is a proposed revision to the Statement of Incompatible Activities for commission employees.

Fair Political Practices Commission
MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox, Scott, and Swanson

From: Mark Krausse, Executive Director

Subject: Proposed Revision to Statement of Incompatible Activities

Date: September 25, 2001

SUMMARY

The commission must determine, for employees under its jurisdiction, those activities which are inconsistent, incompatible or in conflict with the duties of its employees as state officers or employees. (California Government Code section 19990.) Additionally, the commission must ensure that its statement of incompatible activities ("statement") is kept current and that employees are aware of and have access to it. (2 Cal. Code of Regulations section 599.870.)

In compliance with these provisions, FPPC staff developed the revised statement using the process specified in 2 C.C.R. section 599.870. The Department of Personnel Administration reviewed the revised statement and granted its tentative approval. If the commission approves the revised statement, it will be sent again to the Department of Personnel Administration for formal approval, upon which it will become effective immediately.

RECOMMENDATION

Staff recommends the commission approve the revised statement.

BACKGROUND

In 1976, the commission adopted a statement of incompatible activities pursuant to Government Code section 19990 (formerly section 19251). The commission subsequently revised this statement in 1988, devising one statement for employees and officers and one statement for commissioners. Because commissioners are subject to additional prohibitions pursuant to section 83105 of the Government Code,¹ the statement applicable to commissioners is more restrictive than the one applicable to officers and employees. The 1988 statement remains in effect until a revised statement is formally approved by the commission.

¹ Section 83105 states, in part: "No member of the Commission, during his or her tenure, shall hold, any other public office, serve as an officer of any political party or partisan organization, participate in or contribute to an election campaign, or employ or be employed as a lobbyist nor, during his or her term of appointment, seek election to any other public office."

2 C.C.R. section 599.870(a) requires the FPPC, when developing or revising a statement of incompatible activities, to:

- (1) Publish the proposed statement or revision and a supporting statement of rationale for review and written comment by affected employees for at least 30 calendar days.
- (2) Respond in writing to concerns expressed by affected employees and their representatives about the statement during the review period by either making changes to the statement that are responsive to their concerns or informing them why such changes are not being made.
- (3) File with the Department of Personnel Administration for approval a copy of the statement, the statement of rationale, a summary of the process followed in developing or revising the statement, a summary of the written comments received from employees and their representatives and the commission's response to the comments.

A first draft of the statement was distributed to commission employees for a comment period of thirty days.² Several employees submitted comments. A subsequent draft statement incorporated revisions based on these comments. The executive director provided each commenting employee with a response to their respective comments. Organizations representing employees received the subsequent draft with notice of opportunity to meet and confer with the FPPC regarding the draft statement.³ Commission staff met with one organization at the organization's request. A third draft incorporated changes requested at this meeting. This final draft was distributed to commission employees although none submitted comments on this version. The statement was then submitted to the Department of Personnel Administration which granted tentative approval.

STATEMENT PROVISIONS

The revised statement presented to the commission is modeled on the California Public

² Wayne Strumpfer, former FPPC executive director, oversaw the process prescribed by California Government Code section 19990 and 2 Cal. Code of Regulations section 599.870. Legal division staff counsel Natalie Bocanegra provided ongoing staff support for this project.

³ The FPPC is required to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of recognized employee organizations, and must consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action. (Government Code section 3517.)

Employees Retirement System (CalPERS) incompatible activities statement which focuses on complying with the requirements of Section 19990. The presented statement (Attachment 1) differs from the commission's existing statement (Attachment 2) in several ways.

Definitions

The definitions section (section (b)) has been updated to conform with changes made to the rest of the statement. Definitions not supplied by the 1988 statement were taken from the Political Reform Act ("the Act").

Organization

The statement now provides general prohibitions followed by specific prohibitions. (In contrast, the 1988 statement primarily consists of sections segregated by topic areas.) (Sections (c) and (d).)

New Laws

The revised statement conforms with current law. Specifically, language requiring prior approval from the executive director for off-duty activities is not included in the revised statement due to constitutional considerations and recent changes in state law.

California Labor Code section 96 addresses claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premise. The 1999 legislation amending this statute includes this declaration:

“The Legislature finds and declares that, absent the protections afforded to employees by the Labor Commissioner, an individual employee is ill-equipped and unduly disadvantaged in any effort to assert the civil rights otherwise guaranteed by Article I of the California Constitution. The Legislature further finds and declares that allowing any employer to deprive an employee of any constitutionally guaranteed civil liberties, regardless of the rationale offered, is not in the public interest. The Legislature further declares that this act is necessary to further the state interest in protecting civil rights of individual employees who would not otherwise be able to protect themselves.”

An employment law newsletter published the following excerpt soon after the 1999 amendments took effect:

Under a new law that went into effect on January 1, 2000, California employers are prohibited from demoting, suspending or

terminating employees for “lawful conduct” by the employee which occurs during non-work hours and away from the employer’s premises.

This new law, found in the Labor Code section 96, was passed with little debate or analysis by the state Legislature, and may have unintended consequences for employers.

In passing the statute, the Legislature indicated that it was intended to protect employees’ civil liberties, such as their right to participate in political or social causes, without fear of retaliation by their employers. However, the law is so broadly written that it appears to prohibit employers from taking action against employees based on any type of off-duty conduct, provided only that the conduct is not illegal.... Under the new Labor Code section 96, it may now be unlawful for employers even to prohibit their employees from working for direct competitors or from engaging in other conflicts of interest in their off-hours.... Ultimately, the courts will have to decide how far (this new law) goes. In the meantime, employers must take extreme care in taking action against employees because of off-duty conduct. Employers should also review their policies with regard to items such as conflicts of interest...⁴

In light of this statute, the revised statement omits any requirements for prior approval which might serve as a restraint on an officer or employee’s civil liberties. (Section (d)(3).) However, the statement does delineate problematic conduct (e.g., engaging in outside employment with a state candidate) by identifying activities which may jeopardize the “impartial, effective administration and implementation of the Act” mandated by Government Code section 83111.

The revised statement includes updated prohibitions regarding public statements and political activities, modified to ensure compliance with the recent changes to the Labor Code mentioned above. (Sections (d)(2) and (5).) The revised prohibitions focus narrowly on the effect that conduct of an officer or employee may have on impartial, effective administration and implementation of the Act.

Travel

The revised travel section prohibits an employee from accepting travel payments directly from

⁴ From “New Law Prevents Employers from Disciplining Employees for Off-duty Activities,” *Mitchell & Ison Quarterly Newsletter*, January 2000.

non-FPPC sources for purposes of attending training (as opposed to speechmaking) since such payments are subject to both reporting obligations and gift limits. (Section (d)(1).) Under current law, a third-party payment is not reportable by the employee provided the agency follows the requirements of 2 C.C.R. section 18944.2.⁵

Communications

Provisions of the revised statement regarding the commission's communications policy are modeled on the CalPERS statement.

Gifts

The revised statement allows an employee or officer to return a gift within 30 days as provided for in the Act. (Section (d)(4).)

Political Activities

There is no substantive change in the provisions regarding political activities.

Grievances

Section (f) declares an employee's right to appeal any determination made with respect to the provisions of this statement, or any disciplinary action taken pursuant to this statement.

⁵ Regulation 18944.2 provides that a payment, which is a gift as defined in Government Code Section 82028, shall be deemed a gift to a public agency, and not a gift to a public official, if all of the following requirements are met: (1) The agency receives and controls the payment; (2) The payment is used for official agency business; (3) The agency, in its sole discretion, determines the specific official or officials who shall use the payment. However, the donor may identify a specific purpose for the agency's use of the payment, so long as the donor does not designate the specific official or officials who may use the payment; (4) The agency memorializes the payment in a written public record which embodies the requirements of subdivisions (a)(1) to (a)(3) of this regulation set forth above and which: (A) Identifies the donor and the official, officials, or class of officials receiving or using the payment; (B) Describes the official agency use and the nature and amount of the payment; and (C) Is filed with the agency official who maintains the records of the agency's statements of economic interests where the agency has a specific office for the maintenance of such statements, or where no specific office exists for the maintenance of such statements, at a designated office of the agency, and the filing is done within 30 days of the receipt of the payment by the agency.